Supreme Court, U. S.
FILED
SEP 16 1980
MICHAEL RODAK, JR., CLERK

No. 80-78

In the Supreme Court of the United States

OCTOBER TERM, 1979

ANTHONY PROVENZANO, STEPHEN ANDRETTA AND THOMAS ANDRETTA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the jury selection procedures employed by the district court deprived petitioners of a fair trial.

2. Whether the district court properly denied petitioners Thomas and Stephen Andretta's motions for severance and change of venue.

3. Whether the district court abused its discretion in dealing with an incident of juror misconduct.

4. Whether petitioners were deprived of their right to be present at trial by their absence from a conference between their attorneys and the court concerning the juror misconduct incident.

5. Whether the court of appeals properly upheld the admission of certain evidence on a ground that the district court did not consider.

6. Whether 18 U.S.C. 1962(c), which prohibits participation in "any enterprise" conducted through a pattern of racketeering activity, and affecting interstate commerce, reaches participation in illicit ventures, as well as participation in legitimate businesses.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 620 F.2d 985.

JURISDICTION

The judgment of the court of appeals (Pet. App. 42a-43a) was entered on May 8, 1980. A petition for rehearing was denied on June 20, 1980 (Pet. App. 44a). The petition for a writ of certiorari was filed on July 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of participating in the affairs of an enterprise conducted through a pattern of racketeering activity,[1] in violation of 18 U.S.C. 1962(c), and of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d). Petitioners Provenzano and Thomas Andretta were each sentenced to 20 years' imprisonment and fined $20,000. Petitioner Stephen Andretta was sentenced to 10 years' imprisonment and fined $15,000. The court of appeals affirmed (Pet. App. 1a-41a).

The evidence at trial, the sufficiency of which petitioners do not challenge, established that petitioners, through their control of a Teamsters Union local,

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[1]The acts of racketeering consisted of unlawful payments to labor union employees or officers, in violation of 29 U.S.C. 186. See 18 U.S.C. 1961(1)(C).

conspired to obtain illegal payments from trucking companies in return for supplying "labor peace" (see Pet. App. 3a–7a). The target companies, Interocean Services, Inc. and its successor, Di-Jub Leasing Corporation, were "in house" truckers for Seatrain Lines, Inc., a steamship company engaged in shipping containerized freight that was ultimately transported by truck to its final destination.

In early 1970, co-conspirator Ralph Picardo, who operated a trucking firm (Cargo Truck Leasing), negotiated an agreement with Raymond Rosen, Interocean's vice president, to provide trucks and owner-operator drivers to Interocean, thus enabling Interocean to reduce its operating costs substantially by avoiding payment of union wages and benefits to its drivers. In addition, Picardo told Rosen that, through his associates, he could guarantee that no efforts would be made to organize Interocean's drivers, and that Interocean's operations would not be interrupted by labor disputes and would be protected from molestation by other Teamster locals and other unions in the ten states in which Interocean operated (J. App. 999–1004, 1029).[2] Petitioners, through their influence at Local 560 of the International Brotherhood of Teamsters, located in Union City, New Jersey,[3] were

[2] "J. App." refers to the five volume joint appendix in the court of appeals; "J.S. App." refers to the one volume joint supplemental appendix in that court.

[3] During the conspiratorial period, petitioner Provenzano allegedly controlled Local 560 and other locals; between approximately December 1975 and June 1978, Provenzano was the Secretary-Treasurer of Local 560. During the same period, petitioner Stephen Andretta was a business agent and employee of Local 560 (J. App. 954, 960–961, 978–984).

able to ensure Cargo (and, hence, Interocean) an adequate supply of drivers. In return, Picardo received monetary payments through a "ghosting" scheme in which Interocean paid Cargo for fictitious drivers; these payments were divided among petitioners and other co-conspirators (Pet. App. 5a–6a).[4]

The payments generated by the scheme were distributed through various devices (Pet. App. 6a; J. App. 1069–1072, 1146–1147). On at least one occasion Picardo personally delivered cash proceeds of the scheme to petitioner Provenzano and at his direction also used some of the proceeds to pay for the upkeep on horses for Provenzano's daughter (J. App. 1073, 1120–1123, 1297–1298, 1323). Picardo also personally delivered the proceeds to the other petitioners (J. App. 1073–1074, 1090–1092). Moreover, Picardo told petitioner Provenzano "exactly * * * the method [he was] using" to obtain the payments, and Provenzano "complimented" him on the scheme's success (J. App. 1072–1073).

In order to obtain greater profits, petitioners acquired control of Lift-Van Transport, a licensed interstate common carrier, in an attempt to replace Interocean as Seatrain's in-house shipper (Pet. App. 7a; J. App. 1144, 1148). Picardo was the ostensible purchaser of Lift-Van; petitioners in fact contributed to its purchase as silent partners (J. App. 1169–1172,

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[4]Petitioners required Interocean to increase its payments in return for preventing the International Longshoremen's Association from claiming jurisdiction over the movement of trucks in and around Seatrain's pier facilities (Pet. App. 6a; J. App. 1058, 1060–1061).

1176). Lift-Van's Teamsters contract was not renewed after petitioner Stephen Andretta warned officials of the Teamsters local that petitioners' group controlled the company (J. App. 1175–1178). However, Lift-Van did not succeed in its attempt to replace Interocean (J. App. 1220–1223, 2517).

Thereafter, petitioners formed FLT Trucking and Leasing, Inc., which replaced Cargo Truck Leasing as the conduit for the payments from Interocean for the fictitious drivers. Petitioner Thomas Andretta, who was in prison at all relevant times, ostensibly ran FLT (Pet. App. 7a; J. App. 1198–1211, 2193–2194, 2197–2199).

The scheme was uncovered when Picardo agreed to cooperate with the government (Pet. App. 7a).

ARGUMENT

1. During the district court's voir dire of the jury panel, a number of prospective jurors stated that they had some acquaintance with pretrial publicity surrounding the case. Most of that publicity focused on petitioner Provenzano. Petitioners contend (Pet. 19–30) that the district court failed adequately to question the jurors concerning the effect of the pretrial publicity upon their ability to remain impartial and improperly refused to excuse five prospective jurors, only three of whom were challenged for cause. These contentions are without merit.

It is well settled that a defendant is not entitled to a trial by a body of jurors ignorant of all facts surrounding the case, a standard that would be impossible to achieve in many instances. Rather the defendant is

entitled to be tried before an impartial jury that will render a verdict based soley on the evidence presented in court. *Irvin* v. *Dowd*, 366 U.S. 717, 722-723 (1961). No court has ever held that the only impartial jury is a jury completely ignorant of the facts surrounding a case. See *Dobbert* v. *Florida*, 432 U.S. 282, 301-302 (1977). As this Court emphasized in *Irvin* v. *Dowd*, *supra*, 366 U.S. at 722-723: "In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public * * * and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases." The Court added that "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* at 723.

The district court is vested with broad discretion over the questioning of prospective jurors. Fed. R. Crim. P. 24(a); *Ristaino* v. *Ross*, 424 U.S. 589, 594 (1976); *Hamling* v. *United States*, 418 U.S. 87, 139-140 (1974); *Ham* v. *South Carolina*, 409 U.S. 524, 527-528 (1973). And "because the 'determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge'" (*Ristaino* v. *Ross*, *supra*, 424 U.S. at 594-595), his decision that a juror is impartial "will be reversed only for a manifest abuse of discretion." *Government of the Virgin Islands* v. *Gereau*, 502 F.2d 914, 934 (3d Cir. 1974), cert. denied, 424 U.S. 917 (1976); *United States* v. *Gullion*, 575 F.2d 26, 29 (1st Cir. 1978); *United States* v. *Ploof*, 464 F.2d 116, 118 n.4 (2d Cir. 1972).

a. The district court in this case commenced the jury selection process by questioning the panel of 62 prospective jurors in open court on general matters (J. App. 465–502, 552–580, 626–665, 757–773). This was followed by individual questioning of each panel member in chambers regarding exposure to pretrial publicity and each juror's ability to render an impartial verdict (J. App. 504–545, 580–622, 665–744, 774–789); defense counsel participated in this questioning (J. App. 507–508, 511, 514, 517–519, 522–523, 525, 526–527, 530–532, 534, 537–538, 583, 587, 591–592, 595, 597, 601–604, 605–607, 611, 616, 619, 671–673, 677, 680, 682, 692–693, 695–696, 704, 709, 711–712, 718–721, 726–727, 732–733, 736–738, 740, 743–744, 780–782, 786–787, 789). The questions focused on the nature of the information each juror had heard and the amount of detail he or she was able to recall. In addition, the court on numerous occasions inquired whether prospective jurors had discussed among themselves news coverage concerning petitioner Provenzano (J. App. 519, 522, 531, 534, 589, 592, 595, 597, 600, 611, 615–616, 621–622, 673, 692, 713, 720–721, 737, 738, 741, 774, 783, 789).

In determining whether to excuse particular jurors for cause, the court considered the nature of each juror's answers, as well as the juror's demeanor when asserting an ability to decide the case fairly solely on the evidence. Upon considering all of these factors, the district court excused for cause, either sua sponte or on defense challenge, all prospective jurors who had heard of petitioner Provenzano's murder conviction, as well as six jurors (Nos. 25, 34, 43, 45, 51, 55) who had not. Of the jurors who were excused for cause, five

(Nos. 25, 34, 40, 43 and 55) were excused notwithstanding their statements that they were able to disregard what they had read or heard.

Petitioners to the contrary notwithstanding (Pet. 29–30), this record demonstrates not an abuse of the district court's broad discretion over the jury selection process, but an assiduous regard for the rights of the parties to judgment by an impartial panel. After careful and particularized consideration, the court retained only those prospective jurors who satisfactorily demonstrated their impartiality. In these circumstances, "the procedures followed and the questions asked were sufficient to ensure selection of a fair and impartial jury." *United States* v. *Johnson*, 584 F.2d 148, 157 (6th Cir. 1978), cert. denied, 440 U.S. 918 (1979). See *United States* v. *Capo*, 595 F.2d 1086, 1090–1093 (5th Cir. 1979), cert. denied *sub nom. Lukefahr* v. *United States*, No. 79–391 (Jan. 7, 1980).

b. What has been said rebuts in large measure petitioners' further claim (Pet. 21–28) that the district court erred in refusing to strike for cause several jurors who had been exposed to some media coverage about petitioner Provenzano but had assured the court to its satisfaction that they would be impartial. To begin with, as the court of appeals noted (Pet. App. 19a n.15), petitioners waived any objection with respect to two of the veniremen (Nos. 11 and 59), whom petitioners failed to challenge for cause. See *United States* v. *Cepeda Penes*, 577 F.2d 754, 759 (1st Cir. 1978); *United States* v. *Hawkins*, 566 F.2d 1006, 1013 (5th Cir.), cert. denied, 439 U.S. 848 (1978); *United States* v. *Ragland*, 375 F.2d 471 (2d Cir. 1967); *Fabian* v. *United States*, 358 F.2d 187 (8th Cir. 1966).

Moreover, the record clearly supports the district court's findings of impartiality concerning the three challenged jurors whom the district court refused to excuse for cause. See J. App. 519–523, 532–534, 588–591. None of these jurors had heard anything specific about the case (compare *United States ex rel. Doggett* v. *Yeager*, 472 F.2d 229 (3d Cir. 1973)), or had learned about any inadmissible evidence. Nor were these jurors exposed to information about petitioners' past crimes. Compare *Marshall* v. *United States*, 360 U.S. 310 (1959). The three jurors had been exposed to news reports that described petitioner Provenzano in general terms as a "gangster," as having "organized crime" connections, or as involved in "kickbacks into unions." However, as the court of appeals observed (Pet. App. 19a), "[n]o panel member indicated any belief in this type of generalized innuendo, and each assured the district judge in response to a series of five to ten searching questions that he or she would decide the case strictly on the evidence and on the law as explained by the judge and would not be influenced by publicity." The court of appeals correctly concluded, therefore, that the district court's refusal to excuse these jurors for cause was not reversible error.

2. Petitioners Thomas and Stephen Andretta contend (Pet. 30–32) that they were tainted by the publicity concerning petitioner Provenzano and that the district court abused its discretion in denying their motions for a severance and change of venue.[5] We disagree.

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[5] Petitioners presented these motions for the first time during the jury selection process (J. App. 722–723, 791).

On the facts of this case, the trial judge did not abuse his discretion by denying petitioners' motions and by proceeding to determine if an unbiased jury panel could be selected through customary voir dire procedures. See, *e.g.*, *United States* v. *Capo*, *supra*; *United States* v. *Gullion*, *supra*, 575 F.2d at 28; *United States* v. *Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977); *United States* v. *Jones*, 542 F.2d 186 (4th Cir.), cert. denied, 426 U.S. 922 (1976); *Pamplin* v. *Mason*, 364 F.2d 1, 6 n.9 (5th Cir. 1966). As the District of Columbia Circuit observed in *United States* v. *Haldeman*, *supra*, 559 F.2d at 63 (emphasis omitted), "if an impartial jury actually cannot be selected, that fact should become evident at the voir dire." See also *Dobbert* v. *Florida*, *supra*, 432 U.S. at 301-303, rejecting the contention that the "quantum of publicity" surrounding the defendant's offense made it impossible to select a fair and impartial jury. The district court had every reason to believe that the procedures it adopted would ensure the selection of an impartial jury, and, as we have shown, the record confirms that the jury as selected was impartial.

3. The jury in this case was sequestered. Toward the end of the trial, a marshal discovered a juror and two alternate jurors smoking a marijuana cigarette. The marijuana incident was reported to the district judge, who related the incident to counsel and stated that he did not think the jurors' behavior warranted their removal. The judge, however, solicited counsel's opinions concerning an appropriate course of action. After conferring among themselves, defense counsel agreed that the jurors should not be removed; counsel

suggested in addition that the court inform the jurors that they would not be prosecuted (Pet. App. 19a-20a). Counsel's suggestion was intended to eliminate any possibility that the jurors "might be inclined to favor the Government out of fear of prosecution on charges relating to the marijuana incident" (J.S. App. 117-118; see also J.S. App. 9, 11, 16-17, 38-42). The court followed defense counsel's request (J.S. App. 17).

Petitioners now argue (Pet. 32-35) that the district court should have disregarded defense counsel's advice and dismissed the offending jurors sua sponte. This argument is not well taken. As the court of appeals ruled (Pet. App. 20a) in rejecting this claim, there is no reason in this case "to depart from the longstanding rule that counsel's intentional tactical decisions at trial bind his client."[6] See *Wainwright* v. *Sykes*, 433 U.S. 72, 91 n.14 (1977); *Estelle* v. *Williams*, 425 U.S. 501, 512 (1976); *Henry* v. *Mississippi*, 379 U.S. 443, 451 (1965). Inasmuch as the district court followed the path the defense laid out for it, any error in its handling of this episode was invited and accordingly affords petitioners no basis to seek reversal of their convictions. See *United States* v. *Renfro*, 620 F.2d 569, 577 (6th Cir. 1980), petition for cert. pending, No. 80-5192 (filed Aug. 11, 1980); *United States* v. *Witt*, 215 F.2d 580, 584-585 (2d Cir.), cert. denied, 348 U.S. 887 (1954).

[6] It is undisputed that defense counsel's decision not to request removal of the regular juror was a deliberate tactical choice. During their discussions concerning the incident one defense attorney stated that he did not wish to challenge the juror because the first alternate appeared to him to be pro-government (J.S. App. 41; see Pet. App. 23a n.18).

At all events, there was no error in permitting the juror and alternates to remain. A "criminal trial does not unfold like a play with actors following a script * * *. The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process." *Geders* v. *United States*, 425 U.S. 80, 86 (1976). Nowhere is the court given broader discretion than in dealing with allegations of juror misconduct, for the trial judge alone has first-hand knowledge of the jury's demeanor. See *United States* v. *Barnes*, 604 F.2d 121, 144 (2d Cir. 1979), cert. denied, No. 79-261 (Apr. 21, 1980); *United States* v. *Bufalino*, 576 F.2d 446, 451-452 (2d Cir.), cert. denied, 439 U.S. 928 (1978); *United States* v. *Hendrix*, 549 F.2d 1225, 1227-1229 (9th Cir. 1977); *United States* v. *Panebianco*, 543 F.2d 447, 457 (2d Cir. 1976), cert. denied, 429 U.S. 1103 (1977).

Here, there is no reason to believe that the jurors' consumption of marijuana "affected [their] ability to hear evidence or to deliberate" (Pet. App. 21a). Following the incident, no one on the defense team complained that the perception of the juror and alternates involved in the incident seemed impaired (J.S. App. 58-59). Subsequently, in denying a motion for a new trial based upon this incident, the district court found that there was no basis to suggest that "the sharing of a marijuana cigarette by" the regular juror "in any way impaired that juror's ability to continue functioning as a juror" (J.S. App. 117). In the absence of any showing of prejudice, it is apparent that the district court acted well within its discretion in not removing the juror and alternates. See *United States* v.

Taliaferro, 558 F.2d 724, 725–726 (4th Cir. 1977), cert. denied, 434 U.S. 1016 (1978).[7]

4. Petitioners also contend (Pet. 36–39) that their absence from the conference concerning the marijuana incident violated their rights under the Constitution and Fed. R. Crim. P. 43(a) to be present at trial. The court of appeals correctly rejected this contention (Pet. App. 22a–24a).

The conference concerning the jurors' misconduct involved an issue of law and did not concern matters relevant to guilt or innocence. Moreover, although the district court admonished counsel not to disclose the marijuana incident to the press (J.S. App. 39, 41), defense counsel were free to consult with petitioners and solicit their advice during this and other conferences (J. App. 1023–1025). In these circumstances, petitioners' physical absence from the conference bore no rela-

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[7]There is no basis for petitioners' suggestion (Pet. 33) that the district court permitted jurors "to violate the law by smoking marijuana." By declining to discharge the juror and alternates, the court neither approved nor condoned their conduct. Nor may petitioners now claim that the jurors' impartiality was undermined by the court's assurance that they need not worry about prosecution. As the court of appeals pointed out (Pet. App. 22a), "it was defense counsel who insisted on the judge's assuring the jurors that they would not be prosecuted *lest* they favor the Government out of fear of prosecution." Finally, in view of the unusual circumstances presented here, this case does not present an appropriate occasion for this Court to review the court of appeals' failure to reverse petitioners' convictions under its supervisory powers. We doubt that similar incidents of juror misconduct are likely to arise with any frequency, and unless they do we submit that the determination of the proper means of handling such situations is best left to the discretion of the district courts on a case by case basis, subject to review by the courts of appeals.

tion to their "opportunity to defend against the charge" (*Snyder* v. *Massachusetts*, 291 U.S. 97, 105-106 (1934)) and did not deprive them of their Sixth Amendment right to be present at the trial. See *United States* v. *Brown*, 571 F.2d 980, 986-987 (6th Cir. 1978); *United States* v. *Howell*, 514 F.2d 710, 714 (5th Cir.), cert. denied, 423 U.S 914 (1975); *United States* v. *Baca*, 494 F.2d 424, 428 (10th Cir. 1974); *Ellis* v. *Oklahoma*, 430 F.2d 1352, 1354-1356 (10th Cir. 1970), cert. denied, 401 U.S. 1010 (1971).[8]

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[8]The cases relied upon by petitioners (Pet. 37) are inapposite.

In *Nevels* v. *Parratt*, 596 F.2d 344 (8th Cir. 1979), a juror allegedly informed a third party during the trial that he did not think the state had proven its case against the defendant. The defendant was not present during the hearing in chambers at which the juror and the person to whom he had spoken were questioned concerning the incident. Because the hearing concerned a factual inquiry into a matter that was directly related to a "decision about the defendant's guilt" (596 F.2d at 346), the court of appeals agreed that the defendant had a right to be present at the hearing. The court held, however, that the error was harmless beyond a reasonable doubt and affirmed the denial of the defendant's petition for a writ of habeas corpus.

In *Blackwell* v. *Brewer*, 562 F.2d 596 (8th Cir. 1977), the defendant was not present at a hearing where the court questioned deputy sheriffs, bailiffs, and members of the jury to determine whether any jurors had been prejudiced by an altercation between the defendant's supporters and sheriff's personnel in the courtroom hallway in the presence of some jury members. Some of the jurors stated that the incident had frightened them. The court of appeals observed that "[the defendant's] exclusion from the courtroom may very well have led some of the jurors to suspect that [the defendant] himself bore some responsibility for the altercation. The trial judge made no attempt to disabuse the jurors of such a possible inference." *Id.* at 600. While the court expressly found "no constitutional error in the court's in-chambers investigation of the melee" (*id.* at 600 n.3), it concluded that the prejudice to the defendant from his absence was not harmless because it prevented him from consulting with his

Furthermore, assuming arguendo that petitioners were entitled, under Fed. R. Crim. P. 43, to be present at the conference, defense counsel's failure to object to proceeding in petitioners' absence constituted a waiver of that right. See *United States* v. *Brown*, *supra*, 571 F.2d at 987; *United States* v. *Sinclair*, 438 F.2d 50, 52 (5th Cir. 1971); *Cox* v. *United States*, 309 F.2d 614, 616–618 (8th Cir. 1962). At all events, any error arising from petitioners' absence was plainly harmless. See *United States* v. *Brown*, *supra*; *United States* v. *Baca*, *supra*, 494 F.2d at 428–429. As the court of appeals observed (Pet. App. 23a–24a):

> Examination of the record reveals that counsel vigorously safeguarded [petitioners'] interests, to the extent of insisting on procedures they—counsel—thought would yield the best chance for

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attorney with respect to whether any of the jurors had formed the impression that the defendant himself had precipitated the altercation. *Id.* at 600. Accordingly, the court remanded the case to determine whether the defendant had waived his right to object to the court's error.

In *Near* v. *Cunningham*, 313 F.2d 929 (4th Cir. 1963), the court remanded for a hearing to determine whether the defendant had been present at a conference when a decision was made that the jury would not be sequestered. The court stated (313 F.2d at 932) that relief was not warranted on "the mere fact of the prisoner's absence from the conference" but rather that relief would be warranted by that fact "combined with the allegations" that as a result of the court's decision the jury was exposed to highly prejudicial remarks by spectators during court recesses.

Finally, in *Bunch* v. *Maryland*, 281 Md. 680, 381 A.2d 1142 (1978), and *Commonwealth* v. *Robichaud*, 358 Mass. 300, 264 N.E.2d 374 (1970), also cited by petitioners, the courts concluded that under applicable provisions of state law the defendants were entitled to be present at proceedings concerning juror misconduct.

> acquittal. It is fanciful for [petitioners] to suggest *post hoc* that they would have demanded replacement of the offending juror had they been present at the conference.

5. Petitioners contend (Pet. 40–42) that the court of appeals' affirmance of an evidentiary ruling by the district court on an alternative ground not presented at trial violates due process. This contention is without merit.

Three witnesses, Paulette Compton, Mary Hart, and Alan Abramowitz, testified for the government that Picardo had told them about his involvement with petitioner Provenzano in the illegal "ghosting" scheme. The district court admitted this testimony pursuant to Fed. R. Evid. 801(d)(2)(E), as co-conspirator statements made in furtherance of the conspiracy. The court of appeals concluded (Pet. App. 29a) that Compton's testimony was properly admitted on that ground. With regard to the testimony of Hart and Abramowitz, however, the court stated that "[t]he district court made no findings, and the Government has pointed to no evidence indicating that anything Picardo told them could have furthered the conspiracy" (*id.* at 30a). Instead, the court of appeals affirmed the ruling on the alternative ground that the testimony concerning Picardo's statements made prior to Picardo's 1975 murder conviction was probative to rebut the defense claim "that Picardo was lying against all the defendants in return for benefits from the Government" (*ibid.*).

The defense at trial focused on Picardo's credibility, and, in particular, his motivation to testify falsely in order to obtain immunity with respect to the instant

charges and to secure the federal government's assistance in avoiding punishment for the murder conviction (J. App. 886–899, 918–919). During cross-examination of Picardo, counsel for petitioner Provenzano specifically raised the issue of Picardo's bias or motive (Pet. App. 31a n.20; J. App. 1506–1507). In these circumstances, we believe that the court of appeals was correct in concluding that the testimony in question was properly admitted to rebut the defense claim of recent fabrication. We note that petitioners do not contest this conclusion; they merely contend that the court of appeals' reliance upon it violates due process because they were denied the opportunity to contest the admissibility of the evidence on this ground.[9] Petitioners' claim rings hollow in view of their failure to make any substantive argument that the court of appeals was mistaken. Given this implicit concession that the evidence was admissible, the court of appeals' disposition deprived petitioners of nothing they otherwise might have achieved had the district court ruled the testimony admissible to rebut the recent fabrication charge. Plainly, the admission of indisputedly proper evidence does not offend due process. *United States* v. *Rosenstein*, 474 F.2d 705, 709–714 (2d Cir. 1973).[10]

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[9] We disagree with petitioners' claim (Pet. 41) that the government on appeal enjoys an advantage over a criminal defendant because it can suggest alternative grounds not raised at trial for the admissibility of evidence. On the contrary, the admission of evidence on behalf of a defendant is not subject to review on appeal at all.

[10] In any event, the testimony of Hart and Abramowitz was merely cumulative to Compton's testimony, which the court of appeals held (and petitioners do not dispute) was properly ad-

6. Petitioners contend (Pet. 43–51) that their convictions should be overturned because the definition of "enterprise" in the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. 1962–1964) ("RICO") should not be interpreted to include illicit ventures as well as legitimate businesses. In support of this contention, they rely upon the recent decision of the Sixth Circuit in *United States* v. *Sutton*, 605 F.2d 260 (1979), and assert that the decision below "appears" to conflict with the decision in *Sutton*. However, as we have informed the Court in response to petitions for writs of certiorari in several other cases in which this question was presented, the Sixth Circuit has granted the government's petition for rehearing en banc in *Sutton* and has vacated the panel's decision. Accordingly, there is at present no conflict among the circuits on this issue requiring resolution by this Court, since every other court of appeals to have passed upon the question has concluded that 18 U.S.C. 1962 reaches illegitimate as well as legitimate enterprises that are conducted through a pattern of racketeering acivity. *United States* v. *Aleman*, 609 F.2d 298 (7th Cir. 1979), cert. denied, No. 79–1009 (Mar. 24, 1980); *United States* v. *Rone*, 598 F.2d 564 (9th Cir. 1979), cert. denied *sub nom. Little* v. *United States*, No. 79–5013 (Mar. 24, 1980); *United States* v. *Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979); *United States* v. *Elliott*, 571 F.2d 880, 896–899 (5th Cir.), cert. denied, 439 U.S. 953 (1978); *United States* v. *Altese*, 542 F.2d 104 (2d Cir. 1976), cert. de-

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mitted as co-conspirator statements. Any error in the admission of the testimony of Hart and Abramowitz was therefore harmless. *United States* v. *Rosenstein*, *supra*, 474 F.2d at 714.

nied, 429 U.S. 1039 (1977).[11] Moreover, for the reasons stated in our Brief in Opposition in *Little* v. *United States*, *supra*, we submit that Section 1962 reaches not only legitimate businesses or operations, but also informal associations of individuals engaged in illegal activities.[12]

Finally, even assuming that RICO seeks only to preclude corrupt infiltration of legitimate businesses as petitioners contend, reversal of their convictions would not be warranted. The enterprise that was charged in the instant indictment included several legitimate trucking companies (J. App. 19). In addition, as the court of appeals stated (Pet. App. 11a-12a):

> The purpose of RICO—prevention of infiltration of legitimate business by racketeers—would in any event be vindicated by the convictions here, since the wholly illegitimate Provenzano association subverted legitimate unions and businesses * * *.

[11] We note that the Eighth Circuit, in *United States* v. *Anderson*, No. 79-1809 (Aug. 7, 1980), slip op. 29, has recently concluded that Congress in enacting RICO intended the term "enterprise" to encompass only an association whose operations are directed toward an economic goal and whose existence can be defined apart from the commission of the predicate acts constituting the "pattern of racketeering activity." Unlike the panel in *Sutton*, however, the court in *Anderson* did not rest its decision on the legitimacy or illegitimacy of the enterprise, "but rather on the need for a discrete economic association existing separately from the racketeering activity." Slip op. 30. As we show below (pages 18-19, *infra*), the enterprise here included several legitimate trucking companies, and the RICO statute was properly employed as the basis for prosecution in this case, which involved the infiltration of racketeers into an important segment of the nation's business economy.

[12] We are sending petitioners' counsel copies of our submissions in *Little*.

Thus even if there were presently a conflict in the circuits on this issue warranting this Court's review, this case would not be an appropriate one in which to resolve the question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1980

☆U.S. GOVERNMENT PRINTING OFFICE: 1980 327916 72